QUESTIONS PRESENTED

In *Pittston Coal Group v. Sebben*, 488 U.S. 105 (1988), this Court determined that the United States Department of Labor's black lung "interim presumption," 20 C.F.R. § 727.203(b) (1990), was invalid under 30 U.S.C. § 902(f)(2) to the extent that it denied access to the presumption of total disability or death due to coal workers' pneumoconiosis to miners with less than ten years of coal mine employment but who were, nevertheless, able to demonstrate through x-ray or biopsy evidence that they had the disease.

Left unresolved in that decision and now presented for resolution are the following issues:

1. Whether the rebuttal provisions of the United States Department of Labor's black lung "interim presumption," 20 C.F.R. § 727.203(b) (1990), are invalid under 30 U.S.C. § 902(f)(2) because they permit denial of a claim where the medical evidence proves that the miner does not or did not have coal workers' pneumoconiosis or is not disabled or did not die, in whole or in part, due to his pneumoconiosis.

2. Whether the rights of coal mine operators and their insurers under the Due Process Clause of the Fifth Amendment of the Constitution of the United States are violated by an interpretation of 30 U.S.C. § 902(f)(2) which precludes those operators from defending black lung claims by proving that the miner did not or does not have coal workers' pneumoconiosis or that a miner's disability or death did not result in whole or in part from coal mine employment.

LIST OF PARTIES AND RULE 29.1 STATEMENT

John C. Pauley ("Pauley") was a claimant for benefits under the Black Lung Benefits Act. While this matter was pending resolution in the United States Department of Labor, Benefits Review Board, ("BRB"), John Pauley died and is survived by his widow, Harriet Pauley. John Pauley was the respondent below. By decision of the Benefits Review Board Nunc Pro Tunc issued August 14, 1990, Harriet Pauley, now the petitioner, was substituted for the decedent.

Petitioner below and now respondent, BethEnergy Mines Inc., formerly Bethlehem Mines Corporation, is a wholly owned subsidiary of the Bethlehem Steel Corporation. The Director, Office of Workers' Compensation Programs, is the administrator of the black lung program and is a statutory party in all black lung claims. 30 U.S.C. § 932(k).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Nos. 89-1714, 90-113 and 90-114

IN THE

Supreme Court of the United States

October Term, 1990

HARRIET PAULEY, survivor of JOHN C. PAULEY,
Petitioner,

v.

BETHENERGY MINES INC., *et al.*,
Respondents.

CLINCHFIELD COAL COMPANY,
Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR, *et al.*,
Respondents.

CONSOLIDATION COAL COMPANY,
Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR, *et al.*,
Respondents.

BRIEF FOR RESPONDENT BETHENERGY MINES INC.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The following authorities are relied upon by the Respondent, BethEnergy Mines Inc.:[1]

1. The Fifth Amendment to the Constitution of the United States.

2. Section 401(a) of the Black Lung Benefits Act, 30 U.S.C. § 901(a) (1988).

3. Section 402(f) of the Black Lung Benefits Act, 30 U.S.C. § 902(f) (1988). (*Pauley* App. 46-47.)

4. Section 413(b) of the Black Lung Benefits Act, 30 U.S.C. § 923(b) (1988).

5. Section 422(c) of the Black Lung Benefits Act, 30 U.S.C. § 932(c) (1988).

6. The Social Security Administration Interim Presumption, 20 C.F.R. § 410.490 (1990). (*Pauley* App. 50-53.)

7. The Department of Labor Interim Presumption, 20 C.F.R. § 727.203 (1990). (*Pauley* App. 48-50.)

STATEMENT OF THE CASE

A. INTRODUCTION

These consolidated cases seek this Court's review of the validity of certain black lung eligibility regulations published by the United States Department of Labor ("DOL") in 1978 in an effort to comply with the requirements of section 402(f)(2) of the Black Lung Benefits Act, as amended.[2] 30

[1] The Solicitor General's Motion to Dispense with the printing of a Joint Appendix in No. 89-1714 was granted on December 3, 1990. All necessary materials are reprinted in the Appendix to the Petition for Writ of Certiorari. In this brief, citations to (*Pauley* App.) refer to the Appendix to the Petition for Writ of Certiorari filed by Harriet Pauley in 89-1714.

[2] 30 U.S.C. 901-945 (1988) (the "Act").

U.S.C. § 902(f)(2). Portions of the Act administered by DOL create a privately funded federal workers' compensation program with the limited purpose of compensating total disability or death due to coal mine employment related pneumoconiosis ("black lung" disease).[3]

The Act was amended in 1978 to achieve a variety of objectives, among which was the liberalization of the criteria applied by DOL and SSA in determining a claimant's eligibility for benefits. Liberalized criteria were to be retroactively applied by the agencies to all previously denied and pending claims. 30 U.S.C. § 945; *Pittston Coal Group*, 488 U.S. at 110, 122. A provision in the 1978 amendments, *i.e.*, 30 U.S.C. § 902(f)(2), required DOL to promulgate eligibility criteria for applications in previously filed claims and certain new claims[4] that were no more restrictive than the criteria used by SSA in claims filed with the agency.

The centerpiece of SSA's pre-July 1, 1973 eligibility criteria is a regulation called the "interim presumption." 20 C.F.R. § 410.490 (1990). In compliance with section 402(f)(2) of the Act, DOL adopted its version of the interim presumption at 20 C.F.R. § 727.203 (1990). Both sets of interim criteria compel a presumption of a claimant's entitlement to benefits under the Act if the claimant proves the fact or facts

[3] Part C of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §§ 931-945. The Part C program began on July 1, 1973, and established a black lung compensation scheme for claims filed on or after that date. Claims filed between December 31, 1969 and June 30, 1973, are called "Part B" claims. Part B claims were filed with and adjudicated by the Social Security Administration ("SSA"). Benefits paid in approved Part B claims are publicly funded. See *Pittston Coal Group v. Sebben*, 488 U.S. 105, 109 (1988).

[4] DOL was also authorized by the 1978 provisions to write new permanent eligibility regulations for applications in claims filed after their promulgation. 30 U.S.C. § 902(f)(1), (2)(C). The new rules were adopted effective April 1, 1980, and apply to all claims filed on or after that date. 20 C.F.R. Part 718 (1990). Accordingly, claims filed between the date of enactment of the 1978 amendments and March 31, 1980, are also subject to the requirements of section 402(f)(2) of the Act.

that are prescribed in each rule for invocation of the presumption. Both presumptions are expressly rebuttable. The two presumptions are, however, designed and worded differently in several respect.

In *Pittston Coal Group*, this Court struck down the segment of DOL's invocation provisions limiting the availability of the DOL presumption to those cases involving miners with ten or more years of coal mine employment. In comparing DOL's rule to SSA's in this regard, this Court observed that SSA's rule did not invariably require ten years of employment if the claimant proved the existence of pneumoconiosis by x-ray, biopsy, or autopsy evidence. A shorter term miner could benefit from the SSA rule if other proof connected the diagnosed condition to coal mine dust exposure. This option was not available to the DOL claimant. This difference between the two presumptions was clear, and, in the opinion of the Court, unauthorized in light of the plain language of section 402(f)(2) of the Act prohibiting the adoption of more restrictive criteria by DOL. *Pittston Coal Group*, 488 U.S. at 114.

Pauley's appeal asks this Court to invalidate one of the rebuttal segments of the DOL rule on the same theory. In particular, John Pauley was, when he filed for benefits with DOL, totally disabled from work. His disability was, however, entirely unrelated to black lung disease. He was disabled by arthritis and the residual effects of a stroke. DOL's interim presumption expressly provides that rebuttal will occur if "evidence establishes the total disability or death of the miner did not arise in whole or in part out of coal mine employment." 20 C.F.R. § 727.203(b)(3). Because this fact was proven in Pauley's case, the claim was denied.

The text of the SSA presumption does not expressly state that rebuttal will lie on this basis. *See* 20 C.F.R. 410.490(c). Pauley contends, therefore, that SSA's rule is less restrictive than DOL's because the "disability causation" inquiry permitted by DOL in a rebuttal analysis was not a material or

relevant factor in determining an SSA claimant's entitlement for benefits under section 410.490. The cause of a miner's total disability is, according to Pauley, irrebuttably presumed under the SSA rule, and the same irrebuttability must be operative under the DOL rule. Since DOL's rule permits factual inquiry in this regard, it violates section 402(f)(2) of the Act.

The court of appeals found no viable support for Pauley's theory either in *Pittston Coal Group*, the Act or the texts of the rules. (*Pauley* App. 8-18.) The court below refused to award black lung disability benefits on account of disabilities entirely unrelated to black lung disease. BethEnergy Mines urges the Court to affirm.[5]

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[5] In the cases consolidated with Pauley's, *Clinchfield Coal Co. v. Director, Office of Workers' Compensation Programs*, No. 90-113, and *Consolidation Coal Company v. Director, Office of Workers' Compensation Programs*, No. 90-114, benefits were denied under DOL's provision mandating rebuttal if: "The evidence establishes that the miner does not, or did not, have pneumoconiosis." 20 C.F.R. § 727.203(b)(4). In *Clinchfield Coal*, rebuttal was also proper under the (b)(3) rebuttal method and in *Consolidation Coal* rebuttal was also proven under DOL's (b)(2) rebuttal method (miner not totally disabled). In these cases, the Fourth Circuit held that the absence in SSA's rule of a rebuttal provision equivalent to section 727.203(b)(4) invalidated DOL's rule in this regard. *See Dayton v. Consolidation Coal Co.*, 895 F.2d 173, 176 n. * (4th Cir. 1990) (The fact that the miner does not suffer from pneumoconiosis "is superfluous and has no bearing on this case."). Mrs. Pauley agrees, in effect, that the Fourth Circuit erred in striking down section 727.203(b)(4). *See* Pauley's Brief at 20-21. Although the concession is expressly limited to "x-ray cases like Mrs. Pauley's," it rests ultimately on the unstated premise that no section 410.490 claimant may satisfy the affirmative factors necessary for invocation until the existence of pneumoconiosis is proven by the claimant. *Id.* at 22 nn. 11, 12. Since Pauley's concession is compelled by this Court's reading of 20 C.F.R. § 410.490(b)(2) in *Pittston Coal Group*, 488 U.S. at 113, and because section 410.490(b)(2) as well as the provisions it incorporates by reference apply with equal force to all SSA invocation methods, not just the x-ray method, Pauley's attempt to preserve something for the Fourth Circuit claimants to argue is fatally flawed.

B. LEGISLATIVE FACTS

The history and evolution of the Act and the two interim presumptions are set forth in detail in the Brief of the Director, Office of Workers' Compensation Programs and the Joint Brief for Petitioners Clinchfield Coal and Consolidation Coal. There are no significant differences apparent between the government and the coal companies in these discussions. BethEnergy is in agreement with the historical discussions and need not burden the Court with a reiteration.

There are, however, several misleading or inaccurate historical references in Pauley's brief that merit brief comment. First, both Pauley's Brief and the Brief of Amicus Curiae United Mine Workers of America in Support of Claimant and Petitioner argue that section 402(f)(2) of the Act reflects a congressional compromise between an "industry" proposal preferring the development of new eligibility criteria by DOL and groups representing coal miners which preferred the application of an interim presumption in all claims. *See* Pauley's Brief at 12, 41. This is not accurate. Neither the coal industry nor the insurance industry, in the final statements to the Congress in 1977, proposed any eligibility amendments to the existing 1972 statute. *Oversight of the Administration of the Black Lung Program, 1977: Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. (1977) 102 ("*1977 Senate Hearings*") (statement by Carl E. Bagge, President, National Coal Ass'n: "The coal industry does not believe that the existing statute needs to be amended."); *id.* at 119-136 (insurance industry statements warning that certain irrebuttable presumptions proposed by the House of Representatives (but not ultimately enacted) were inappropriate and uninsurable).

The only participant in the legislative process seeking DOL authority to promulgate new eligibility criteria for all

claims was the Department of Labor staff.[6] DOL's view was that the SSA interim standards were confusing and that the ventilatory criteria for invocation of the SSA presumption were inappropriate:

> Well, as I understand it, the interim medical standards are used as a preliminary screening mechanism for Part C[7] claims, but there is concern that they may not be medically supportable as standards for total disability.
>
> Under the Department of Labor's adversary procedure, Senator, expert medical testimony may be able to rebut a determination of total disability based on the interim standards.
>
> For example, one of the major problems with both the title IV and the interim ventilatory standards is that . . . the breathing level represented as "total disability" under the interim standards is actually the medically predicted "normal" for miners 65 or older and may be restrictive for younger miners.
>
> There are also questions about how you use blood gas tests. There are questions about the use of the interim standards as to what do they really mean when you have to actually explore it as a medical expert and, again defend it before a hearing?

Id. at 146-47 (statement of Assistant Labor Secretary Elisburg). Elisburg's question concerning the "real meaning" of the SSA interim standards was never answered in either

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[6] Neither the insurance industry nor the coal industry had any reason to believe that the Department of Labor and the administration of President Carter, who strongly supported the liberalization of the black lung program, would be inclined to write eligibility rules acceptable to the industries.

[7] Elisburg probably meant to refer here to Part B claims, since the interim standards were not, at that time, applicable at all in Part C claims.

House of Congress or by any witness. It is quite likely that no one knew the answer beyond the general assumption that the Part B approach was liberal and would lead to the approval of more Part C claims. The House/Senate compromise that mandated DOL's adoption of interim standards for the group of claims identified in 30 U.S.C. § 902(f)(2) reflected only this understanding and nothing more. It certainly did not mediate any identifiable disagreement between miners and coal companies over "disability causation" or any other specific "criteria". The compromise was reached solely on the understanding reflected in the Conference Committee's report directing DOL to publish a version of SSA's criteria ensuring the consideration of all relevant evidence in the Part C adjudication. H.R. Rep. No. 864, 95th Cong., 2d Sess. 16 *reprinted in* 1978 U.S. Code Cong. & Admin. News 309; *see also* 124 Cong. Rec. 2330, 2333 (1970) (statement of Congressman Perkins). Beyond this, Pauley's attempt to draw precise meaning from the Congressional agreement to apply interim presumptions in Part C claims ultimately fails because it is not supported by any apparent authority.

In this same vein, Pauley's emphasis on legislative materials purporting to demonstrate "that it is virtually impossible to determine to what extent, if any, miners' disabilities or deaths can be attributed to CWP," Pauley's Brief at 6, is misleading and irrelevant. It is not virtually impossible, or even difficult, to identify the cause of a disability or death when either event is attributable to an auto accident, gun shot wound or clearly non-respiratory disease. It may be difficult if the cause is a respiratory disease, but even in this context there is no indication whatsoever that Congress was dissatisfied with a presumption that shifted this so-called impossible burden to the employer.[8] An attempt was made in 1977 by the House of Representatives to make the presumed connection

[8] It is, of course, difficult to make a disability causation distinction in some cases and in those cases the claimant almost always prevails under DOL's section 727.203(b)(3).

between long-term employment and disability or death irrebuttable. *See e.g.* H.R. 10760, 94th Cong., lst Sess. § 2 (1975); H.R. 7, 94th Cong., lst Sess. § 3 (1975). These proposals were not adopted.

There is nothing in the legislative record supporting the theory that their attempt carried over into the congressional decision to deploy interim criteria in Part C claims. There is nothing whatever in the legislative materials suggesting that "disability causation" was an irrebuttable element in the SSA interim approval, or that Congress intended to immunize this element in any case from scrutiny in light of evidence in a claim record.

The only definitive interpretation of the meaning of the SSA presumption conveyed to Congress was supplied by Assistant Secretary Elisburg in 1977, *see infra* p. 7 and Labor Solicitor Kilberg in 1974. In an early effort to have SSA apply its interim presumption to DOL claims, Kilberg wrote to his counterpart in HEW requesting uniform standards for all claims. Kilberg noted that the Senate Report language suggesting special interim adjudicatory rules did not justify different standards for DOL claims:

> It only directs Social Security to make a lesser effort to rebut the evidence submitted by a backlog of claims. . . . It has been pointed out that the interim criteria do no more than establish a rebuttable presumption of eligibility for benefits. The criteria by their terms set forth a number of avenues of rebuttal. A rebuttable presumption suffers from constitutional infirmity only if it is, in fact, irrebuttable. . . . This is clearly not the case with respect to the interim criteria. Any coal operator has ample opportunity and resources available to him to present sound medical evidence tending to rebut the presumption of eligibility created by the interim presumption. . . . Expert medical testimony, as well

as claimant's active work responsibilities, are only two examples of rebutting evidence. . . . "

H.R. Rep. No. 151, 95th Cong., lst Sess., 18-19 (1977).

The implication that Congress intended irrebuttability as to disability causation or any other factor cannot be demonstrated.

C. PAULEY'S CASE

John Pauley worked as a miner for thirty years. He had early stage, simple coal worker's pneumoconiosis. On April 21, 1978, he filed a claim for benefits under the Act. (*Pauley* App. 3-4.) His case was tried before an administrative law judge ("ALJ"). DOL's interim presumption applied to Pauley's claim and was invoked by x-ray proof of pneumoconiosis. 20 C.F.R. § 727.203(a)(1). (*Pauley* App. 35-36.) As dramatically portrayed in Petitioner Pauley's Statement (*see* Pauley's Brief at 2), the miner had many symptoms and did have some serious medical problems but since none of these conditions had anything to do with his employment as a coal miner, after review of all pertinent evidence, the ALJ concluded that the presumption was rebutted under 20 C.F.R. § 727.203(b)(3) by proof that Pauley's disability did not arise in whole or in part out of coal mine employment. (*Pauley* App. 37-38.)[9]

[9] These findings have never been challenged. (*Pauley* App. 5.) Now, however, Pauley argues the ALJ inaccurately categorizes the medical opinion and accordingly improperly weighs the evidence in coming to the conclusion that rebuttal under section 727.203(b)(3) is satisfied. *See* Pauley's Brief at 14 n.9. This substantial evidence challenge has long since been abandoned, having not been preserved before the BRB or in the court of appeals. "After a thorough weighing of the evidence the judge concluded that Bethenergy 'has sustained its burden of establishing that pneumoconiosis is not a contributing factor in [Pauley's] disability' and thus had succeeded in rebutting the presumption in Pauley's favor [footnote omitted]. *This finding is not challenged on this appeal.*" (*Pauley* App. 5; emphasis added.)

The ALJ then considered the claim under SSA's rule and found invocation based upon Pauley's admitted pneumoconiosis. He further determined that rebuttal was not available because Pauley was totally disabled due to conditions that had nothing to do with his coal mine employment; namely, arthritis and a residual hemiparesis. (*Pauley* App. 39.) The ALJ awarded benefits, determining the fact that Pauley's total disability had nothing to do with his coal employment was irrelevant under SSA's rule. (*Pauley* App. 40.)[10] The BRB affirmed. (*Pauley* App. 21-22.)

On appeal, the Third Circuit reversed. (*Pauley* App. 19.) The court was troubled by the fact that Pauley's entitlement depended upon which presumption was used. The court concluded that the statute controlled and benefits were not available to Pauley because the Act provided benefits only to miners totally disabled, at least in part, by pneumoconiosis arising out of coal mine employment. (*Pauley* App. 12 citing 30 U.S.C. § 901(a); *Mullins Coal Co.*, 484 U.S. 135, 141 (1987).) The court held that disability causation rebuttal is implicit both under SSA's and DOL's regulations and the Act. (*Pauley* App. 14-19.)

Predominant in the court's reasoning are two inexorable concerns: (l) " . . . no set of regulations under it [the Black Lung Benefits Act] may provide that a claimant who is statutorily barred from recovery may nevertheless recover" and (2) " . . . the only way in which we [the Court] can affirm the Benefits Review Board [the award] is to hold that even though BethEnergy should, on the law and facts, have prevailed under the Benefits Act, by reason of the presumptions and

[10] The administrative law judge relied on *Sulyma v. Director, Office of Workers' Compensation Programs*, 827 F.2d 922 (3d Cir. 1987), for the proposition that "disability causation" was not a proper rebuttal inquiry under SSA's rule but, such an interpretation was specifically rejected by the decision's author, Circuit Judge Morton I. Greenberg. (*Pauley* App. 18-19.)

limitations on rebuttal it must be responsible for benefits. We decline to reach such an unjust result." (*Pauley* App. 13-14.)

The Third Circuit holds that absent an irrebuttable presumption,[11] coal mine operators are free to defend black lung claims by demonstrating that the miner's death or disability did not arise in whole or in part out of coal mine employment. (*Pauley* App. 12-13.)

SUMMARY OF ARGUMENT

Depriving operators the vehicle of disability causation rebuttal would require the payment of benefits to coal miners who do not have coal workers' pneumoconiosis or attendant disability, contrary to the Act and in derogation of due process of law. The affirmative arguments made by the Solicitor General with coal mine operator petitioners in the consolidated cases are adopted by BethEnergy: 20 C.F.R. § 727.203(b)(3), (4) are valid.

Petitioner Pauley's argument requires this Court to determine that SSA's rules as applied are contrary to the express limitation of the Act, that its benefits are available

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[11] The Third Circuit rejected Pauley's contention that SSA's presumption is irrebuttable as to the cause of the presumed total disability.

> We point out that when Congress wants to make a presumption irrebuttable so as to establish entitlement it knows how to do so. An irrebuttable presumption of total disability arises under 30 U.S.C. § 921(c)(3) if the evidence shows that the miner has a complicated case of coal miner's pneumoconiosis as defined in the subsection. In the event a miner may receive benefits even if there is other evidence that the miner can do his usual coal mine work or other comparable and gainful work. [citation omitted.] There is, however, no indication that Congress had any intention to make the presumption invoked here on behalf of Pauley paramount over a showing by Bethenergy that Pauley did not qualify for benefits under the Benefits Act. We also observe that our result eliminates possible due process problems raised by the Director.

(*Pauley* App. 13.)

only to persons whose death or total disability was caused by pneumoconiosis. It then requires the conclusion that Congress knew of this deceptive practice, that it sanctioned this deception, and ultimately directed its adoption by the Secretary of Labor.

There is no compelling argument advanced by Pauley in support of this proposition. There is no legislative history supporting Congress's desire to eliminate the statutory requirement that compensable death or total disability be caused by coal workers' pneumoconiosis. Certainly there is no statutory provision which so states.

Pauley's endeavor to transfer claim liability to the Trust Fund where a responsible operator successfully defends a claim on the basis of disability causation rebuttal has no statutory authority or even vague support. It is clearly not the purpose for which the Fund was established.

The Third Circuit's resolution of the claim of John Pauley is correct and must be affirmed. There is neither statutory nor constitutional tolerance for the payment of black lung benefits to miners who are not disabled as a result of coal workers' pneumoconiosis.

ARGUMENT

A. INTRODUCTION

BethEnergy joins in the affirmative arguments made by the Solicitor General with coal mine operator petitioners in these consolidated cases, defending the validity of 20 C.F.R. § 727.203(b)(3), (4). BethEnergy also joins in suggestions that the retroactive imposition of liability on mine owners for the total disability or death of their employees whether or not there is a relationship between the disability or death and the employment relationship violates the rights of the operators under the Due Process Clause of the Fifth Amendment to the United States Constitution. Further elaboration by

BethEnergy is unnecessary. Several of the points raised by Pauley do, however, merit further comment.

B. THE DEPARTMENT OF LABOR'S INTERIM PRESUMPTION IS NOT INVALID BECAUSE IT PERMITS A FACTUAL INQUIRY INTO WHETHER A MINER'S TOTAL DISABILITY IS IN SOME WAY RELATED TO PNEUMOCONIOSIS

DOL's adoption of a disability causation rebuttal test is entitled to some respect unless it is plainly prohibited by the Act. The plain text of the Act contains no such prohibition. Accordingly, Pauley's argument seeking invalidation of DOL's disability causation rebuttal provision disintegrates unless it demonstrates with some degree of clarity that SSA's rules preclude consideration of this element of the eligibility equation. Pauley's arguments fall far short of identifying such proof. These interdependent focal points provide the coordinates of Pauley's argument: SSA's rules of behavior, section 402(f)(2) of the Act, and Congress's intent. The resulting contrivance is speculative, most likely inaccurate, and not persuasive.

Starting at the base of this pyramid, Pauley posits two assumptions concerning Congress's intent. First, it is assumed that in 1972, when the Senate Committee suggested SSA's adoption of interim rules, *see* S. Rep. No. 743, 92d Cong., 2d Sess. 18-19 (1972), *reprinted in* 1972 U.S. Code Cong. & Admin. News 2304, 2322-23, it was expected that SSA would eliminate disability causation as a fact element in the cases decided under these rules. This intent is derived from a 1972 Comptroller General's report conveying SSA's belief that it was "virtually impossible" to differentiate disability caused by pneumoconiosis from that caused by other lung diseases, and from Congress's desire to expedite the adjudication of claims. Next, it is assumed that in 1977 Congress was aware that SSA did, in fact, eliminate disability causation as a fact element within the confines of SSA's

interim presumption, and that legislators wanted DOL to follow the same pattern.

The two assumptions are undocumented and illogical. Congress did not in 1972 or thereafter express either intention directly or by clear inference. If in 1972 or 1978, Congress intended to dramatically alter the eligibility equation by eliminating one of its critical elements, one would expect to find some kind of statement to that effect. By all appearances it seems that Congress in 1972 thought it had adequately addressed the diagnostic difficulties and related proof problems facing miners by the adoption of the fifteen-year respiratory disease presumption, 30 U.S.C. § 921(c)(4), by limiting the significance of negative chest x-rays, and by requiring the consideration of all relevant medical evidence, *id.* 923(b). *See* S. Rep. No. 743 *supra*, p. 14 at 8-116. The "interim evidentiary rules and disability evaluation criteria" envisioned in the Senate Report were mandated by the language in the Report to compensate for the lack of adequate medical testing facilities in mining regions and to allow speedy awards based upon medical testing that was then available. *Id.* at 18. In no way does this authorizing language imply any fundamental change in the statutory eligibility equation.

There is, moreover, not a hint that the Senate expected SSA to compensate disabilities that were unrelated to respiratory or pulmonary disease. Pauley's insistence that disability causation was designed to be irrebuttable no matter what kind of health defect the miner suffered cannot be extracted from anything stated in the 1972 proceedings.

Subsequent proceedings leading to the adoption of the 1978 amendments provide nothing to sustain Pauley's theory of Congress's intent in 1972. The only direct information provided to Congress in this period was that SSA did not take

an adversarial role in claims adjudication[12] despite the fact that SSA's presumption was rebuttable in light of any relevant rebuttal evidence. *See* H.R. Rep. No. 151 *supra* p. 10 (Kilberg letter). If anyone, whether a Congressional witness or member of Congress believed that SSA's section 410.490 presumption was in any way irrebuttable, that belief was not stated.[13] In the legislative proceedings culminating in the 1978 amendments, there is no discussion at all suggesting that section 410.490 precluded factual inquiry into the disability causation element.

The foundation of Pauley's theory lies in the premise that Congress purposefully directed first SSA and then DOL to adopt interim evidentiary rules making disability causation irrelevant or irrebuttably presumed. There is no proof of that at all and some persuasive evidence to the contrary.

Pauley's statutory and regulatory arguments falter as well for their lack of foundation or rationality. There is, of

[12] Both DOL Solicitor Kilberg in 1974 and Assistant Secretary Elisburg in 1978 informed Congress that SSA used its interim presumption as a screening device. *See infra* pp. 7, 10. A claim was "screened in" when the claimant met the invocation criteria in section 410.490. Since SSA made little effort to challenge a claimant's evidence or to explore presumed facts with independent evidence, the screening in was tantamount to an award. Congress knew that in DOL cases mine operators would not passively defend themselves and in the often cited language of the 1978 Conference Report told DOL not to require a passive defense. H.R. Rep. No. 864, *supra* at p. 8. The floor debates addressing the disagreement between Senate and House conferees over whether HEW, like DOL, was now going to be more active in defending claims received by SSA under 30 U.S.C. § 945(a) (*i.e.*, consider all relevant evidence), served only to caution SSA not to abandon its passive strategy. *See infra* pp. 7-8.

[13] The adoption of SSA's interim presumption for DOL claims was widely criticized. None of the testimony or statements made in opposition, however, other than DOL's objections to the pulmonary function test criteria, defined the reasons for opposing such adoption with any specificity. It is likely that industry witnesses knew of the presumptions' general liberality, and opposed it for this reason alone. See

course, no plain language in the Act per se to lend even a hint of support to the irrebuttability theory. To advance it, Pauley must segregate section 402(f)(2) of the Act not only from the Act as a whole but from the section in which it appears. *See* Pauley's Brief at 33 n.22 (notes that section 402(f)(2) is not in the same subparagraph as the material in section 402(f)(1).) Having done so, Pauley need not clutter her arguments with the specific provisions of the Act but is free to attempt to penetrate section 410.490 in isolation.

But even this degree of linguistic surgery is not good enough to clear the screen for Pauley's argument. It is still necessary to excise the references in section 410.490(c) to 20 C.F.R. § 410.412(a)(1) and the specific provisions of section 410.490(b)(2), (3). After eliminating any regulatory or statutory provision suggesting a disability causation element, Pauley is then free to announce that there is none.[14]

The affirmative proof that no disability causation inquiry was written into the SSA rule is derived, in Pauley's argument, from an internal Manual used by SSA, the absence of judicial interpretations of the SSA presumption demonstrating a disability causation prong to the eligibility inquiry and Congress's concern over proof difficulties faced by claimants. None of these sources are substitutes for the plain language of the Act, which clearly contemplates a disability causation inquiry in all disability claims, or the reasonably inclusive incorporation by reference in the SSA rules nor are

[14] With respect to the cross-references in 20 C.F.R. § 410.412(a)(1) to sections 410.424-410.426, Pauley argues that the meaning derived from the references must be limited to those segments of sections 410.424 and 426 that refer to "comparable and gainful work". Thus, Pauley concludes that disability alone and not disability causation is the only inquiry provided by the overall cross-references from section 410.490(c)(2) to section 410.412(a)(1) to sections 410.424 and 426. Although we would hesitate to attribute a great deal of precision to SSA's drafting of its regulations, there is no apparent reason to limit SSA's incorporations to exclude any part of the material that is incorporated. Pauley's attempt to do so is strained and unexplained.

these authorities independently compelling. If Congress was aware of and agreed with the 1972 Comptroller General's report[15] stating the view of some unnamed person at SSA that disability causation was a "virtually impossible" inquiry in a black lung claim, it does not follow that Congress responded by making disability causation irrebuttable under SSA's interim rules. Since the "virtually impossible" problem would arise only in connection with a pulmonary disease related disability it would have been monumental overkill for SSA to have written a rule embodying the virtual impossibility of a differential diagnosis where disability was caused, for example, by a brain tumor, an accident, or the myriad of other illnesses that afflict the human body. It is far more logical to assume that SSA would address this difficulty by merely relieving the claimant of the burden of proving disability causation. This is a much more likely explanation for what SSA did, and it is the approach that is fully consistent with the evidentiary changes made by Congress in the 1972 adoption of the statutory fifteen-year presumption. 30 U.S.C. § 921(c)(4) (rebuttably presuming total disability due to pneumoconiosis if the miner was totally disabled by a respiratory or pulmonary disease and had fifteen years of mine employment); *see also* 20 C.F.R. § 410.490(a).

The absence of published case law under SSA's rule is no help.[16] SSA neither developed rebuttal evidence nor did it view its role as adversarial. In 1977 SSA informed the Comptroller General that it had no resources or mandate to actively

[15] The report is not mentioned in the 1972 legislative record, so far as has been determined.

[16] In one decision arising under SSA's presumption in which disability causation is discussed, it appears that SSA argued in favor of a "primary reason" causation test like the one in 20 C.F.R. § 410.426(a). *Haywood v. Secretary of Health and Human Services*, 699 F.2d 277, 286 (6th Cir. 1983).

litigate Part B claims.[17] SSA's choices in this regard were matters between the agency and Congress, but they clearly do not carry the implication that mine owners and the Secretary of Labor were also to take the role of observer in Part C claims litigation.

SSA's Manual is similarly meaningless. First, as noted by the Government, the provisions in the Manual may suggest that SSA's interim presumptions contained no limitation on rebuttal whatever, and that it could operate as a more traditional "bursting bubble" role of proof. *See* Labor's Brief at 22-23. This interpretation is not inconsistent with 20 C.F.R. § 410.490(b)(2), (3), and (c), none of which parts of the SSA rules expressly limit rebuttal inquiries.

The Manual is, in any event, not a reliable or meaningful source of authority for any purpose. If it were inconsistent with the Act, or the published regulations of the agency, it would not control. It is also not generally a public document and there is no indication anywhere that Congress or anyone outside of SSA knew of its contents. The statements in the Manual do not stand alone in guiding agency personnel. They are supplemented by innumerable rulings, bulletins, amendments, interpretative guidelines and common practices by the agency.[18] Whatever SSA, or any agency, does behind closed doors is not a reliable or proper source of authority. *See Bowen v. City of New York*, 476 U.S. 467, 475 (1986). A

[17] Comptroller General of the United States, *Report to the Senate Comm. on Human Resources: Program to Pay Black Lung Benefits to Coal Miners and their Survivors — Improvements Are Needed* 43-47, 51-52 (1977), *reported in 1977 Senate Hearings, supra*, p. 6 at *316-20, 324-25*.

[18] Counsel for the petitioners in *Clinchfield Coal*, No. 90-113, submitted a request to SSA under the Freedom of Information Act for all general operations documents used by SSA in its administration of the Part B program. Counsel was informed that this body of documents was composed of the Manual and the forty crates of additional documents stored in the agency's archives. The Manual was obtained but the forty crates were left undisturbed.

far better source in the setting presented here is DOL's contemporaneous construction of its responsibilities under 30 U.S.C. § 902(f)(2). DOL is the agency that was directed to write an interim presumption for certain Part C claims and it is DOL's exercise of the granted authority that is now before the Court.

Pauley's theory seeking invalidation of DOL's disability causation rebuttal rule is without substance and should be rejected.

C. THE COURT SHOULD NOT IMPOSE LIABILITY ON THE BLACK LUNG TRUST FUND IN CLAIMS LACKING A CONNECTION BETWEEN A MINER'S DISABILITY AND COAL MINE DUST RELATED DISEASE

After having spent considerable effort to convince the Court that section 402(f)(2) of the Act erects an irrebuttable presumption of disability causation for miners who are able to invoke an interim presumption, Pauley concedes, as he must, that the irrebuttable presumption does not apply in cases involving mine operators because of section 422(c) of the Act. 30 U.S.C. § 932(c). Section 422(c) prohibits the imposition of liability on a mine operator unless the disability or death of a miner arose, at least in part, out of employment in the operator's mines. Pauley argues that where a mine operator may prevail under this provision, the Black Lung Disability Trust Fund must pay the claim.

There is no source of authority to justify an interpretation of Part C to require or permit the application of various eligibility rules depending on whether a mine operator or the Trust Fund will pay the benefits awarded. The Trust Fund is authorized, inter alia, to pay benefits when "there is no operator who is liable for the payment of benefits." 26 U.S.C. § 9501(d)(1)(B).

Neither 26 U.S.C. § 9501(d)(1)(B), nor any other provision of law, acknowledges the possibility that only a financial

solvent or fully insured mine operator may escape liability for the payment of benefits to an otherwise eligible claimant. DOL's regulations define where an operator is liable ("responsible") and when it is not liable. An operator is a "responsible" operator if it employed the miner for at least one year, was a mine operator during the requisite periods, and is financially responsible. 20 C.F.R. §§ 725.492, 725.493. DOL is expressly authorized by the Act to regulate the conditions upon which liability may be imposed upon an operator. 30 U.S.C. § 932(h), and by implication this authority requires the Secretary to regulate concerning when liability falls on the Trust Fund. At no place in DOL's rules or in the Act's legislative history is there a hint that there could ever be a Part C claim in which the eligibility criteria would differ in the same litigation depending on who pays.[19]

The Trust Fund "stands in the shoes of the employer. . . . ", *Director, Office of Workers' Compensation Programs v. Black Diamond Coal Mining Co.*, 598 F.2d 945, 953 (5th Cir. 1979); *see also Republic Steel Corp. v. Director, Office of Workers' Compensation Programs*, 590 F.2d 77 (3d Cir. 1978); *Director, Office of Workers' Compensation Programs v. South East Coal Co.*, 598 F.2d 1046 (6th Cir. 1979); *Director, Office of Workers' Compensation Programs v. Leckie Smokeless Coal Co.*, 598 F.2d 881 (4th Cir. 1979). The Secretary of Labor, on behalf of the Trust Fund was granted full party status in claims, 30 U.S.C. § 932(k), and all of the defensive rights available to an employer and insurance carrier. 30 U.S.C. § 932(a) ("reference in [the Longshore] Act to the

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[19] Such a rule, if adopted, would most likely have an unfortunate impact on the Trust Fund. So as not to jeopardize an award it would often make sense for an administrative law judge to find disability causation rebuttal in favor of the operator and then let liability come to rest on the Fund. Since operators will always investigate disability causation with medical evidence, the easy solution for the ALJ and the best approach for the claimant is a Trust Fund award. A smart claimant would not attempt to answer section 727.203(b)(3) rebuttal evidence submitted by an operator.

employer shall be considered to refer to the trustees of the fund, as the Secretary [of Labor] considers appropriate. . . . ") The Longshore Act contains the procedural rights conferred on mine operators and all other parties. *Id.*

Pauley's attempt to extract benefits from the Black Lung Disability Trust Fund is artful but wrong.[20] There is no supporting authority for the result sought in this connection.

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[20] Also wrong is Pauley's statement:

> At the time *Usery* [*v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976)] was decided, unlike now, an operator who successfully avoided liability under Section 422(c) also defeated the claim entirely because the Trust Fund did not yet exist. Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-227, § 3(a)(1), 92 Stat. 12 (1978) (creating the Trust Fund).

See Pauley's Brief at 47 n.30. On the contrary, a claimant entitled to benefits for whom, for some reason, there was no responsible operator and prior to the creation of the Fund, section 424 provides ". . . . the Secretary shall pay such miner. . . . " Black Lung Benefits Act of 1972, Title IV; Part C, § 424, 83 Stat. 798, May 19, 1972, Pub. L. No. 92-303, § l(c)(1), 86 Stat. 151.

CONCLUSION

The decision of the United States Court of Appeals for the Third Circuit in No. 89-1714 should be affirmed. The decisions of the Fourth Circuit in Nos. 90-113 and 90-114 should be reversed.

Respectfully submitted,

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